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Supreme Court of the United States

October Term, 1952

No. 427

AGRA B. WILLIAMS,
Petitioner,

v.

THE VIRGINIA MILITARY INSTITUTE, a corporation, and AMERICAN SECURITY AND TRUST COMPANY, a corporation, Executor of the Estate of MARY E. MAXWELL, deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

AGRA B. WILLIAMS,
Petitioner,

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Agra B. Williams, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the District of Columbia Circuit, hereinafter referred to as Court of Appeals, rendered on the 31st day of July, 1952, (R. 28) which in turn affirmed the judgment of the United States District Court for the District of Columbia, entered on Sept. 8, 1950, (R. 13) and the order entered on the 24th day of July, 1951, (R. 24).

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. No. 1254 (1).

The opinion of the United States Court of Appeals for the District of Columbia Circuit, hereinafter referred to as Court of Appeals, was filed on the 31st day of July, 1952, (R. 28). Orders staying the mandate pending filing of this petition for certiorari have been entered.

This is a kindred suit covered by a petition for a writ of certiorari, heard before the same judges at the same time in the Court of Appeals, both decided later as above set out. The other petition is No. 311, October Term, 1952, and is known as *Agra B. Williams, petitioner* v. *Protestant Episcopal Seminary in Virginia.*

OPINIONS BELOW

The opinion of the District Court is found on page 11 of the proceedings in the Circuit Court of Appeals. The order of the District Court denying the right of petitioner to proceed by declaratory judgment is found on page 13. The opinion of the District Court is not yet reported in the Federal Supplement, nor has the opinion of the Court of Appeals as yet been published in the Federal Reporter.

QUESTIONS PRESENTED BY THIS PETITION

The questions presented here were raised in a declaratory judgment suit, which prayed for personal judgment against the executor and an in rem judgment against the fund, both in the District of Columbia. The Virginia Military Institute moved to dismiss upon the grounds: (a) because the petition failed to state a claim upon which relief could be granted, as the Commonwealth of Virginia was an indispensable party and could not be made a party without depriving the court of jurisdiction; and

(b) because the Court lacked jurisdiction to hear a case against The Virginia Military Institute, a public corporation of the State of Virginia, and the suit, in substance, is one against the State (R. 9). The District Court so held (Rfl 13).

The petitioner herein appealed. In the Court of Appeals the appellant raised the following questions:

> "I Whether a District of Columbia Court has jurisdiction in a declaratory judgment suit to construe the will of a decedent domiciled there, the executor of whose estate is domiciled there and the personal assets of whose estate are situated there, and render a personal judgment against the executor in accordance therewith, when one of the legatees is a public corporation of the State of Virginia with power to sue and be sued.
>
> "II Whether a statute of Virginia, fixing jurisdiction over certain public corporations will be allowed to defeat the jurisdiction of a federal court which has personal jurisdiction of the executor of an estate and in rem jurisdiction of the assets thereof, in a suit for declaratory judgment to construe a will.
>
> "III Whether a party will be rendered remediless by being forced to litigate her rights, under a will admitted to probate in the District of Columbia, in a Virginia Court which has no jurisdiction of the personal assets or the fiduciary of the estate."

The Court of Appeals decided none of these questions. The Court merely determined that "Courts have a broad measure of discretion in deciding whether to grant declaratory relief". It refused to decide any of the questions before it and dismissed the suit without prejudice, suggesting that the Virginia courts had jurisdiction and that the questions are "far more appropriate for decision by the Virginia courts than by the courts of the District of Columbia". (Opinion R. 31).

The Court of Appeals further determined that if the trial court had considered the question of discretion, discretion should have been exercised unfavorably to the granting of the declaratory relief requested. (Opinion R. 31). This is an admission that the Court of Appeals determined the matter upon a question not before it for decision. Indeed the appellee in the Court of Appeals urged only (a) that the immunity from suit in the Eleventh Amendment precluded any action against the appellee; (b) that the Eleventh Amendment prevented any action against The Virginia Military Institute; (c) that the State of Virginia had not waived its immunity; and (d) that no question of a suit for construction of a will was involved. (R. 29-30).

The questions presented by this petition are:

(1) The Court of Appeals did not pass upon the questions presented to it, but dismissed the case without prejudice and told your petitioner to go to the Courts of Virginia, where the executor of the estate does not reside, where no part of the assets of the estate can be found, and where the judgment of the Virginia court would be a nullity.

(2) Have the Courts of Virginia any jurisdiction in this case and is not the jurisdiction of the courts of the District of Columbia clear and unquestionable, even though the case must ultimately be determined according to the law of Virginia?

(3) Can the Court of Appeals dismiss a suit where the jurisdiction was plain, clear and unquestionable?

(4) Where the personal representative and the assets of the estate are in the District of Columbia and the personal representative is made a party to the suit, is not The Virginia Military Institute only a proper but not a necessary party to this proceeding?

(5) Can a Virginia statute be used to defeat the jurisdiction of a federal court which has personal jurisdiction of the executor of an estate and in rem jurisdiction of the assets thereof, in a suit for declaratory judgment to construe a will and to take a personal judgment against the executor and an in rem.

(6) Can the Court of Appeals render remediless a party by forcing her to litigate in Virginia under a will probated in the District of Columbia, where the Virginia courts have no jurisdiction of the personal assets or the fiduciary of the estate?

STATUTES INVOLVED

Section 23-97 of the Code of Virginia of 1950, which reads as follows:

> "The board of visitors may sue and be sued for any cause or matters which have heretofore arisen, or which hereafter arise."

Section 8-38 (9) of the Code of Virginia of 1950 reads as follows:

> "If it be an action or a suit in which it is necessary or proper to make any of the following public officers a party defendant, to-wit, the Governor, Attorney General, State Treasurer, Secretary of the Commonwealth, Comptroller, Superintendent of Public Instruction, or Commissioner of Agriculture and Immigration; or in which it may be necessary or proper to make a party defendant the State Board of Education, or other public corporation composed of officers of government, of the funds and property of which the Commonwealth is sole owner; or in which it shall be attempted to enjoin or otherwise suspend or affect any judgment or decree on behalf of the Commonwealth, or any execution issued on such judgment or decree, it shall be only in the City of Richmond."

STATEMENT OF CASE

Early in 1949, Miss Mary E. Maxwell, a resident of the District of Columbia, for many years, died, leaving a last will and testament, which was duly probated.

The defendant, American Security and Trust Company, qualified as executor. Under the twenty-seventh clause of her will, Miss Maxwell divided her residuary estate, which consisted solely of personalty, into two parts—one half she bequeathed to The Virginia Military Institute, and the other half she bequeathed to Protestant Episcopal Theological Seminary, both in trust.

Petitioner here filed a declaratory judgment suit. The Virginia Military Institute moved to dismiss. (R. 9). Observe its grounds.

The District Court decided in favor of The Virginia Military Institute and dismissed the suit. Petitioner appealed to the United States Circuit Court of Appeals for the District of Columbia. The latter court, notwithstanding the fact that the decedent was a resident of the District of Columbia, and the personal representative was in that jurisdiction and the entire estate was in the District of Columbia, decided that the courts of the District of Columbia *had no jurisdiction* and only the courts of the State of Virginia had such jurisdiction. (Opinion R. 31). The Circuit Court of Appeals dismissed the case without prejudice. Although the real defendant was and is the executor, it occupied the position of an innocent by-stander, just as was done in the Theological Seminary suit. It has taken no action, except nominally, since the beginning of this litigation.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred as follows:

1. In determining that this was a declaratory judgment suit, whereas in fact it also sought personal judgment against the executor and in rem judgment against the fund, both of which were in its jurisdiction.
2. In holding that jurisdiction between the parties was properly in the Circuit Court of the City of Richmond (Virginia) which could not exercise jurisdiction over the executor or the fund and enter a decree binding against either.
3. In affirming, in substance, the action of the District Court, in dismissing this suit on the ground that the appellee possessed the sovereign immunity of the State of Virginia and was thus immune from suit.
4. In refusing appellant a hearing against the executor and the fund.
5. In holding that appellee was an indispensable party.
6. In allowing a state statute to defeat the jurisdiction of a federal court which had personal jurisdiction of the executor and in rem jurisdiction of the assets, on the ground that the exercise thereof is discretionary.

REASONS RELIED UPON FOR GRANTING THE WRIT

The Court of Appeals by its decision affirmed the decision of the District Court which granted the motion of the appellee to dismiss. Although the Court of Appeals based its decision on the sole ground that the granting of the declaratory relief sought by appellant was discretionary in the District Court, nevertheless by its affirmance the Court of Appeals sustained the holding of the District Court that there was no jurisdiction in the Dis-

trict of Columbia to litigate the right of a legatee, under the will of a domiciled resident of that territory, admitted to probate in the District of Columbia, to take personal assets situated there in the hands of an executor domiciled there. The District Court was also thereby affirmed in its holding that the appellee was an indispensable party to this proceeding and being an arm of the State of Virginia, it was immune from suit under the Eleventh Amendment to the constitution, thus precluding appellant from proceeding in rem against the assets and in personam against the executor.

The appellee does not possess the sovereign immunity of its creator. It is a public corporation, and can sue and be sued (1950 Code of Virginia Sections 23-92, 97.) Thus it lost its sovereign immunity under the Eleventh Amendment, *Hopkins* v. *Clemson Agricultural College,* 221 U. S. 636, 55 L. Ed. 890; *Lincoln County* v. *Luring,* 133 U. S. 529, 33 L. Ed. 766; *Federal Land Bank* v. *Priddy,* 295 U. S. 229, 79 L. Ed. 1408, Reh. den. 295 U. S. 769, 79 L. Ed. 1709; *Interstate Const. Co.* v. *Regents of the University of Idaho,* 199 F. 509; *Dunnington* v. *Northwest Turnpike Road,* 6 Gratt 160. Immunity from suit, of a public corporation, must be expressly stated, *Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381, 83 L. Ed. 784.

The Court of Appeals held that the matter at issue here could be litigated in the Courts of Virginia. The complaint here also asked for a judgment in rem against the assets, and in personam against the executor. The sovereignty of a state court does not extend to and embrace property without the territorial jurisdiction of the state. *Overby* v. *Gordon,* 177 U. S. 214, 44 L. Ed. 741; *McClelland* v. *Corland,* 217 U. S. 268, 54 L. Ed. 762; *Waterman* v. *Canal-Louisiana Bank & Trust Co.,* 215 U. S. 33, 54 L. Ed. 80. Appellant was entitled to a hearing for judgment against the executor; a state statute

cannot deprive a federal court of jurisdiction over assets within its jurisdiction, because the judgment may affect the distribution in another forum of the assets of a domiciled decedents estate, *Hess* v. *Reynolds,* 113 U. S. 28 L. Ed. 927; *Payne* v. *Hook,* 7 Wall. 425, 19 L. Ed. 260; *Ingersoll* v. *Coram,* 211 U. S. 335, 53 L. Ed. 208; *Penroyer* v. *Neff,* 95 U. S. 722, 24 L. Ed. 568; *Mexican C. R. Co.* v. *Pinkney,* 149 U. S. 194, 37 L. Ed. 699.

The appellee contended, and the Court of Appeals agreed, that there was jurisdiction in the Circuit Court of the City of Richmond, (Virginia). That Court would have no jurisdiction over the executor or the fund, *Watson* v. *Jones,* 13 Wall. 679, 20 L. Ed. 666. The appellee is not a "public corporation composed of officers of government of the funds and property of which the Commonwealth is sole owner", as required by 1950 Code of Virginia, 8-38, 40, in order to give that Court jurisdiction. *Western State Hospital* v. *General Board,* 112 Va. 230, 70 S. E. 505; *Universal Life Ins. Co.* v. *Cogbill,* 71 Va. 72, 30 Gratt. 38; *Commonwealth* v. *Wilson,* 141 Va. 116, 126 S. E. 220; *State Highway Commission of Virginia* v. *Nock,* 138 Va. 212, 120 S. E. 869. Jurisdiction of a federal court over assets of a deceased person within its jurisdiction cannot be defeated by the laws of a state seeking to give exclusive jurisdiction to its own courts, either upon the principle of convenience or otherwise, *Hess* v. *Reynolds, supra; Hayes* v. *Pratt,* 147 U. S. 557, 37 L. Ed. 279; *Clark* v. *Bener,* 139 U. S. 96, 35 L. Ed. 88.

The appellee was a dispensable party, because a decree could be shaped protecting its interests, *De Korwin* v. *First Nat'l. Bank of Chicago, et al,* 156 F. (2d) 858, cert. den. 329 U. S. 795, 91 L. Ed. 680, *Waterman* v. *Canal.-Louisiana Bank, supra.*

This suit prayed judgment against the executor and against the fund, and therefore sought a determination

of the validity of rights preceding distribution, and a construction of the residuary clause of testatrix' will, which was proper. *Comm. Trust Co.* v. *Bradford,* 297 U. S. 613, 80 L. Ed. 920.

OPINION OF CIRCUIT COURT OF APPEALS

With all due respect to the learned gentlemen who heard this case below, the opinion shows a decided turn towards arbitrary discretion.

All of the cases cited to sustain the text of the opinion turn upon a different principle. Each of them denied a declaratory judgment, because there was litigation pending elsewhere and the motion for dismissal was in effect, the old plea in abatement of another suit pending. An examinaton of these cases will sustain this statement.

It is respectfully submitted that the Court of Appeals exercised an arbitrary and unreasonable discretion, if one it had, as the opinion claims, and has attempted to send the petitioner to the Virginia Court which has no jurisdiction, either to pass upon the legal question involved, or, if it had, to render any judgment binding a fiduciary in the District of Columbia or the fund in its hands and under its control.

What courts other than those of the District of Columbia can pass upon the questions raised and render judgment here?

AGRA B. WILLIAMS,
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By AUSTIN F. CANFIELD
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BRIEF AND APPENDIX FOR RESPONDENT, THE VIRGINIA MILITARY INSTITUTE, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

THE VIRGINIA MILITARY INSTITUTE,
Respondent

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SUGGESTION THAT THE PETITION SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH THE RULES

Rule 38(3) of this Court requires that "notice of the filing of the petition, together with a copy of the petition, printed record, and supporting brief, shall be served by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the court or a justice thereof when the court is not in session), and due proof of service shall be filed with the Clerk. * * *"

The petition in this case was filed on October 29, 1952.

The respondents were not served at all until December 15, 1952. On that date, forty-seven days after the filing of the petition, the respondent, The Virginia Military Institute, was served with two copies of the petition, but the printed record was not served. On December 18, 1952, the respondent, American Security and Trust Company, was served with copies of the petition and the printed record. (The "Affidavit re Service of Copies of Petition for Writ and Transcript of Record" filed by counsel for petitioner, recites that the service of American Security and Trust Company was made of December 16, 1952; while we do not consider the difference of two days as being material, our information is that December 18, 1952, is the date on which service was made.) Not until January 5, 1953, sixty-seven days after the petition was filed, were copies of the printed record filed with the respondent, The Virginia Military Institute. (See aforementioned affidavit re service.)

In so far as this respondent is advised, the time for serving these copies has not been enlarged by the court or a justice thereof.

It is, therefore, suggested that sufficient reason exists why the Court should dismiss the petition for failure to comply with the rules of the Court.

THE STATEMENT OF THE CASE

Agra B. Williams, the petitioner here, instituted this action in the United States District Court for the District of Columbia with a "complaint for Construction of Will and Declaratory Judgment." The purpose of the action was to have the Virginia Military Institute and the Protestant Episcopal Theological Seminary declared incapable of taking and receiving a legacy, thereby creating an intestacy with regard to the residium of the estate of Mary E. Maxwell (R. 14). The residium was divided by the twenty-

seventh clause of Mary E. Maxwell's will—one-half to the Virginia Military Institute and the other half to the Protestant Episcopal Theological Seminary (R. 15).

The Seminary made the appropriate defenses and has been adjudged capable of taking under the will (198 F. 2d 595, cert. den. 73 S. Ct. 105, rehearing den. 11-24-'52).

The Virginia Military Institute filed a motion to dismiss the suit in so far as it pertained to that portion of the estate bequeathed to the Institute on the grounds that the federal court lacked jurisdiction over the matter in controversy under the provisions of the Eleventh Amendment to the Constitution of the United States. The complaint contains only one ground as a basis for relief against The Virginia Military Institute, that being that the Institute is powerless to take by gift or devise. No other basis for relief is set forth in the complaint. It, therefore, appears that the relief sought cannot be obtained by construction of the will but rather can be obtained only by a construction of the powers of The Virginia Military Institute. Indeed, the complaint itself concedes that the will must be construed as bequeathing one-half of the residue to The Virginia Military Institute (R. p. 3). The Institute takes the position that it is an indispensable party to such adjudication and therefore, since it is an agency and arm of the Commonwealth of Virginia, the action is one against the State, brought by a citizen of another state and outside the jurisdiction of the federal courts.

The District Court in a memorandum opinion granted the motion to dismiss for the reasons relied upon by the Institute (R. 13).

From that action the petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals affirmed the judgment of the District Court on the ground that, in the exercise of the

court's discretion, relief by way of declaratory judgment should have been denied because "* * * the remaining questions—including the basic one whether the Institute is capable of taking bequests under Virginia law—are far more appropriate for decision by the Virginia courts than by the courts of this jurisdiction; they involve, exclusively, Virginia law and local Virginia policy" (R. 31).

The petition for certiorari followed.

STATUTES AND PROVISIONS OF THE CONSTITUTION OF VIRGINIA INVOLVED

The statutes and provisions of the Constitution of Virginia deemed material are set forth in an appendix to this brief which is contained in the latter pages hereof.

ARGUMENT

I.

The Grounds upon Which the Court of Appeals Based Its Decision was Valid

A.

THE SUIT WAS ONE FOR DECLARATORY JUDGMENT

The Court of Appeals determined that the District Court might have refused to grant relief by way of declaratory judgment through an appropriate exercise of its discretion. The petitioner here contends that the court erred in determining that this is a declaratory judgment suit.

It is undeniable that the court could have entered a personal judgment against the executor and an in rem judgment against the fund in this suit only after first determining that The Virginia Military Institute is powerless to accept a bequest. No other basis of relief is asserted. It is, therefore, clear that only after the declaratory judgment could the personal and in rem judgments have been entered. Therefore, the basic question, *the only question in dispute*, was one requiring a declaratory judgment.

Throughout this litigation the petitioner has insisted that this is a suit for declaratory judgment. She referred to it as such in the Complaint (R. 14) and the Amended Complaint (R. 19). The District Court found it to be such (opinion R. 11). The petitioner did not assert before the Court of Appeals that this action, which she entitled a "Complaint for Construction of Will and Declaratory Judgment," was not a declaratory judgment suit. On the contrary, on page 18 of her brief filed in that court she said:

> "*In a declaratory judgment suit, such as this,* a court of equity will strain hard to adjudicate the merits if it can be done without prejudice to the rights of parties, beyond the jurisdiction of the Court * * *." (Emphasis added)

Having urged upon the Court of Appeals that theory, she should not be heard to complain because the court determined it to be a suit for declaratory judgment.

B.

THE EXERCISE OF DISCRETION

The Court of Appeals in its decision said:

> "Courts have a broad measure of discretion in deciding whether to grant declaratory relief. When a court has doubt as to its own jurisdiction but sees another forum whose jurisdiction is clear, it may be moved to decline to entertain an action for a declaratory judgment." (R. 3)

The Court went on to point out that, as The Virginia Military Institute has insisted throughout, the petitioner may have the power of the Institute to take determined, but a determination of that question is "far more appropriate for decision by the Virginia courts * * * [it involves], exclu-

sively, Virginia law and local Virginia policy" (R. 31). Therefore, the Court of Appeals felt that an exercise of discretion unfavorable to the granting of relief should have been made.

The Court of Appeals cites *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 494; *Aetna Casualty & Surety Co.* v. *Quarles*, 92 F. 2d 321, 323 (4th Cir.); *Maryland Casualty Co.* v. *Boyler Constr. Co.*, 123 F. 2d 558 (4th Cir.); *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U. S. 180, 183-85; *Carbide & Carbon Chemicals Corp.* v. *U. S. Industrial Chemicals*, 140 F. 2d 47 (4th Cir.); *Commercial Credit Co.* v. *Martin*, 275 Ky. 548, 122 S. W. 2d 135, and Borchard, *Declaratory Judgments*, c. 5 at 302 (2d Ed. 1941). These authorities uniformly support the position of that Court.

The language of the Court of Appeals for the Fourth Circuit in *Carbide & Carbon Chemicals Corp.* v. *United States Industrial Chemicals, supra*, is particularly pertinent:

> "Another ground upon which the exercise of discretion by the lower court should be sustained is that there was unquestioned jurisdiction in the New York Court, whereas the jurisdiction of the Maryland Court was doubtful * * *." (140 F. 2d 47, 50)

The Court of Appeals might have added that a recognition of the importance of maintaining harmonious relations between parallel systems of state and federal courts would require a federal district court, in the exercise of sound discretion, to refuse to grant relief by way of declaratory judgment where such relief could only be granted after deciding a question of state law more appropriate for decision by the state courts. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 84 L. Ed. 876, 60 S. Ct. 628; *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, 85 L. Ed. 971,

61 S. Ct. 643; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 86 L. Ed. 1355, 62 S. Ct. 986; *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101, 89 L. Ed. 101, 65 S. Ct. 152; *American Federation of Labor, Metal Trades Dept.* v. *Watson*, 327 U. S. 582, 90 L. Ed. 873, 66 S. Ct. 761.

In *Chicago* v. *Fieldcrest Dairies, supra, which was a suit for a declaratory judgment*, Mr. Justice Douglas, in delivering the opinion of the Court, said:

> "* * * It is an exercise of a 'sound discretion, which guides the determination of courts of equity.' Beal v. Missouri P. R. Co., supra (312 US p. 50, 85 L. ed. 579, 61 S. Ct. 418). In this case that discretion calls for a remission of the parties to the state courts which alone can give a definite answer to the major questions posed. Plainly they constitute the more appropriate forum for the trial of those issues. See 54 Harvard L. Rev. 1379. Considerations of delay, inconvenience, and cost to the parties, which have been urged upon us, do not call for a different result. For we are here concerned with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole." (316 U. S. 168, 172)

II.

The Case for Dismissal Under the Eleventh Amendment

The petitioner argues that the decision of the Court of Appeals has the effect of affirming the judgment of the District Court though based on different grounds.

Regardless of that effect, the decision of the Court of Appeals, being predicated upon well established principles of law, should not be disturbed; however, an examination of the pertinent statutory law of Virginia and the decisions of this Court will reveal that the decision of the District Court is plainly right.

In arguing for dismissal under the Eleventh Amendment the respondent recognized that it would be necessary to establish three propositions:

(A) That The Virginia Military Institute is a necessary party to the action.

(B) That The Virginia Military Institute is an agency and arm of the Commonwealth of Virginia.

(C) That this is an action against the Institute and, therefore, against the State.

With those propositions established it was assumed that the mandate of the Eleventh Amendment would operate to provide immunity.

The validity of each proposition will be briefly discussed in the order in which they appear above.

A.

THE VIRGINIA MILITARY INSTITUTE IS A NECESSARY PARTY

In order to fully appreciate the status of The Virginia Military Institute in this suit it must always be kept in mind that, while the suit is brought under the guise of a suit for construction of a will, it is in reality a suit to construe the powers of the Institute. No question of construction of the will is present. The only basis for relief asserted is that the Institute is powerless to accept the bequest.

It would appear elementary that where the fundamental issue which must be determined is the power of a corporation to act, then, certainly that corporation is an indispensable party to the action. It would be contrary to all principles of law and justice to render a binding judgment determinative of the power of a corporation unless that corporation be made a party.

When an action involves the validity *or construction* of a charter of a corporation that corporation is a necessary party. *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 22 S. Ct. 308, 46 L. Ed. 499.

Even if this were a simple will contest with no question of corporate power involved, the Institute would be a necessary party. In suits affecting the rights of residuary legatees or next of kin, the general rule is that all the members of the class must be made parties. *McArthur* v. *Scott*, 113 U. S. 340, 28 L. Ed. 1015.

The petitioner argues that the Institute is not a necessary party because a decree could be shaped protecting its interests (Petition, 9). The only decree that could give the relief sought by the complaint is one predicated on a finding that the Institute is powerless to accept a bequest. Such a decree could hardly be said to protect its interests.

B.

THE VIRGINIA MILITARY INSTITUTE IS AN AGENCY AND ARM OF THE COMMONWEALTH OF VIRGINIA

The validity of this proposition may be established in several ways.

It is expressly declared to be such by the statutes of Virginia (Section 23-14, Code of Virginia, 1950) (Appen. pg. 1).

It is an educational institution, supported out of the public treasury (Section 23-92, Code of Virginia, 1950) (Appen. pg. 2).

It is declared to be such in paragraph 6 of the Complaint and Amended Complaint.

It is declared to be a public corporation on page 8 of the Petition for Writ of Certiorari.

The District Court in its opinion found it to be "undisputed that The Virginia Military Institute is a State insti-

tution and an agency of the Commonwealth of Virginia" (R. 12).

C.

THIS IS AN ACTION AGAINST THE INSTITUTE AND, THEREFORE, AGAINST THE STATE

Whether a suit is within the prohibition of the Eleventh Amendment is determined not by reference to the nominal parties but by reference to the real parties in interest. When a state is the real party in interest and is the real party against which relief is sought, the nominal defendants being its officers and agents without any personal interest in the subject matter, the suit is within the prohibition of the Eleventh Amendment, and if the State has not consented to be sued the suit cannot be maintained. *Hagwood* v. *Southern,* 117 U. S. 52, 29 L. Ed. 805; *In re Ayers,* 123 U. S. 443, 31 L. Ed. 216; *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 35 L. Ed. 363; *Poindexter* v. *Grunhow,* 114 U. S. 270, 29 L. Ed. 185.

The Memorandum opinion of the District Court summed up our position here accurately and concisely in these words:

> "The Supreme Court has held that whether a state is the actual party in the sense of the 11th Amendment to the Constitution is determined 'by a consideration of the nature of the case as presented on the whole record.' *In re Ayers,* 123 U. S. 443, 492. The question raised by the complaint herein is the power of the State of Virginia, through its agent, The Virginia Military Institute, to accept funds bequeathed to it under a will duly admitted to probate. This Court is of the opinion that such an action is a suit against the State of Virginia and is prohibited by the 11th Amendment to the Federal Constitution unless Virginia has waived its immunity from suit. *Ford Motor Co.* vs. *Dept. of Treas.,* 323 U. S. 459. *O'Connor* vs. *Slaker,* 22 F. 2d 147. *Missouri* vs. *Fiske,* 230 U. S. 18." (R. 12)

When a corporation is performing what is essentially a public or governmental function it is, in effect, a part of the government. *Ballaine* v. *Allaska M. R. Co.* (1919; C. C. A. 9th), 259 F. 183, 8 A. L. R. 990; *Lord & B. Co.* v. *United States Shipping Bd. Emergency Fleet Corp.* (1920; D. C.), 265 F. 955; *Kansas City Bridge Co.* v. *Alabama State Bridge Corp.* (1932; C. C. A. 5th), 59 F. (2d) 48; (Certiorari denied 297 U. S. 644, 77 L. Ed. 557, 53 S. Ct. 90); and *Cox* v. *University of Alabama* (1919), 161 Ala. 639, 49 So. 814. In the last case cited the Court said:

> "Public institutions created by the state for charitable or educational purposes are a part of the state, or a mere agency of the state."

The relief asked by the complaint would have the effect of precluding The Virginia Military Institute from receiving its share of the bequest and would thus in practical effect operate as a money judgment. In this connection it should be noted that the State Treasurer was named a party defendant in the complaint (R. 15) and the amended complaint (R. 3), although he was never served with process (R. 29). But even if the relief sought did not involve a money judgment against the State, that fact would not remove it from the scope of the Eleventh Amendment. *Missouri* v. *Fiske*, 290 U. S. 18, 78 L. Ed. 145.

After establishing that The Virginia Military Institute has immunity from a suit brought by a citizen of another state in a federal court there remains only the question of whether it has waived such immunity.

It is well settled that the suability of a state depends upon the terms of the consent as to persons, courts and procedures. *Great Northern Insurance Co.* v. *Read*, 322 U. S. 47, 86 L. Ed. 1121; *Smith* v. *Reeves*, 178 U. S. 436, 44 L. Ed. 1140.

The Commonwealth of Virginia has expressly limited suits against The Virginia Military Institute to the Circuit Court of the City of Richmond (Section 8-38(9), Code of Virginia, 1950) (Appen. pg. 1).

The petitioner argues that the Institute is not such public corporation as the statute requires. The statute sets forth two requirements:

1. It must be composed of officers of government.
2. The Commonwealth must be sole owner of its funds and property.

The Board of Visitors of The Virginia Military Institute is composed of officers of government. The Adjutant General of Virginia and the Superintendent of Public Instruction are ex-officio members. The other eleven members are appointed by the Governor subject to confirmation by the Senate (Section 23-93, Code of Virginia, 1950) (Appen. pg. 2). Their terms of office *are expressly fixed by the Constitution of the State* (Section 142, Constitution of Virginia) (Appen. pg. 4). The Board is subject at all times to the control of the General Assembly (Section 23-93, Code of Virginia, 1950) (Appen. pg. 2), and their expenses are borne by the State (Section 23-3, Code of Virginia, 1950) (Appen. pg. 1).

The property of the Institute is owned exclusively by the State. Section 141 of the Constitution of Virginia forbids the appropriation of public funds to any school or institution not owned or exclusively controlled by the State or a political subdivision thereof (Section 23-92 of the Code of Virginia, 1950, provides for the support of the Institute out of the public treasury) (Appen. pg. 2). At each session of the General Assembly funds are appropriated for that pur-

pose. The conclusion is inescapable that the Institute is just such a corporation as is contemplated by Section 8-38(9).

CONCLUSION

For the reasons stated it is submitted that the decisions of the courts below are correct and that a writ of certiorari in this case should be denied or that the petition should be dismissed for failure to comply with the rules.

Respectfully submitted,

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